IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 68

LEON SPENCER,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

BRIEF FOR THE APPELLANT

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Opinion Below

The opinion of the Court of Criminal Appeals of the State of Texas is reported in 389 Southwestern Reporter 2nd Series, 304. A copy of the opinion of the Texas Court of Criminal Appeals is attached hereto as Appendix A.

Jurisdiction

The appellant was indicted and charged with murder with malice in the killing of Luvenia Irvine, his common-law wife, and was further charged under the terms and provisions of Article 64 of the Texas Penal Code, and Article 642 of

the Texas Code of Criminal Procedure, as having been previously convicted of the offense of murder with malice, and was sentenced to death in the electric chair. The order and the opinion of the Texas Criminal Court of Appeals affirming said conviction was entered on March 16, 1965, and Appellant's motion for rehearing was overruled without written opinion by said Court on May 5, 1965. A notice of appeal was filed in Texas Court of Criminal Appeals on June 5, 1965. The Jurisdictional Statement and alternate application for Writ of Certiorari was filed in the Supreme Court on June 10, 1965; each step and each procedure having been done within 90 days of the rendering of the original opinion and judgment of the Texas Court of Criminal Appeals.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. 1257, §2 and §3.

On August 26, 1965, this court requested that the State of Texas, appellee, file a response in this case evaluating the appellant's claims in light of Texas Senate Bill 107 signed into law June 18, 1965. On September 17, 1965, Appellee's Response to Appellant's Appeal and Alternate Application for a Writ of Certiorari was filed. On September 25, 1965, the appellant's reply to appellee's response was filed herein.

On October 25, 1965, the Supreme Court issued an indefinite stay of execution pending the final determination of this appeal. On January 31, 1966, this Court granted the motion for leave to proceed *in forma pauperis* and ordered that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits. In the event this Court feels that it does not have jurisdiction under the terms and provisions of Title 28 U.S.C.

1257 §2 and §3, to review the constitutionality of Article 642 Code of Criminal Procedure since this article has now been repealed by the Texas Legislature, then the defendant would respectfully show unto the court that this is a serious question, *i.e.*, one literally of life and death for this defendant, and that the procedure in question is still the law in approximately 25 states and this problem will continually occur in the future, and that the article in question was not repealed at the time of trial and is not retroactive in its application to this defendant. This defendant is not the only one whose rights have been in the past and will be in the future unconstitutionally denied because of this article and this procedure; therefore, this instant case is distinguishable from *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 614 and this is not a case of isolated significance and this matter represents an issue of immediate public significance, not only to the defendant but to all other people that will be charged in the future under the habitual criminal statutes. Under the many decisions of this court contained in Supreme Court Digest, Courts Key Number 397½ (b) this court should consider this matter as an alternate application for Writ of Certiorari and grant this Writ of Certiorari and reverse this matter in the event the court feels this appeal is improvident. Title 28 U.S.C. 1257, §2 and §3.

Questions Presented

Do Article 64 of the Texas Penal Code and Article 642 of Vernon's Annotated Code of Criminal Procedure (Appendices B & C), and the accompanying procedure which requires a reading of the indictment by the prosecuting attorney after the impanelment of the jury and the present-

ment of proof to the jury of a prior conviction of murder with malice of a former wife prior to the determination of the guilt or innocence of the defendant on the primary charge of murder with malice of his wife deny such defendant due process of law and a fair and impartial jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America?

Have the provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America been violated where the defendant in the criminal proceedings in the state court is convicted in the state by statute and procedure which require compliance with the Constitutional due process of law, by allowing the state to inform prospective jurors of a prior conviction, and to read portions of the indictment to the jury alleging a prior offense and to establish by proof the prior conviction before the jury prior to the determination of the guilt or innocence of the defendant on the primary offense, and by further allowing the jury to decide as to the validity of the prior offense and the identification of the defendant at the same time as determining the guilt or innocence of the defendant on the primary charge?

Statutes Involved

Article 64 of the Texas Penal Code and Article 642 of Vernon's Annotated Code of Criminal Procedure as set forth in Appendices B & C hereto.

Statement

The defendant was indicted by the 1964 grand jury of the Criminal District Court of Jefferson County, Texas sitting in Beaumont, Texas, and was charged with murder with malice in the killing of Luvenia Irvine, his common-law wife, said offense being charged as having occurred on January 7, 1964. The defendant was further charged under the terms and provisions of Article 64 of the Texas Penal Code as having been previously convicted on the third day of April 1951 of an offense to which the penalty of death was affixed as an alternate punishment, to-wit: murder with malice of a former wife. Said allegations of the prior conviction were for the purpose of enhancing the punishment in the event the jury convicted the defendant of the offense of murder with malice. Trial began on the 26th day of July, 1964, with selection of the jury, and the jury returned its verdict on Saturday, the 1st day of August, 1964, after approximately one hour of deliberation, and returned a verdict of murder with malice and further found that the defendant was the same individual who had been previously convicted of murder with malice and assessed his punishment at death in the electric chair. The defendant appealed to the Texas Court of Criminal Appeals, which affirmed his conviction.

Summary of Argument

The defendant, Leon Spencer, has been deprived of a fair and impartial jury and a fair and impartial trial and thereby has been denied due process of law by allowing the State of Texas to explain to each juror on the voir dire examination that the state was contending the defendant

had been convicted of murder with malice once before and to allow the reading of the indictment alleging a prior conviction and to introduce proof of a prior conviction of murder with malice of a former wife on the main trial before the determination of the guilt or innocence of the defendant on the charge of murder with malice, the primary offense. Such evidence weighs too heavily upon the minds of the jury and thereby prejudices the defendant's right to a fair and impartial trial upon the basis of primary offense, and such testimony and evidence is only admissible for the purpose of enhancement of the punishment which would not come into consideration until the jury had determined the guilt of the defendant.

Such evidence of a prior conviction was not to be considered as any evidence of guilt on the primary offense and had this evidence come through any other source such as a court bailiff, newspaper accounts or during the trial of any other case it would universally be held to be so prejudicial as to declare a new trial.

The issue of determination of guilt or innocence on the primary offense is completely independent and disassociated with the question of enhanced punishment because of a prior conviction.

An instruction to the jury not to consider the evidence of a prior conviction as any indication of guilt on the primary offense is completely worthless and does nothing but draw this to the jury's attention.

It is well established that the admission of evidence or allegations of prior crimes at a criminal trial either to establish guilt or to show that a defendant would be likely to have committed the crime with which he is charged is a

denial of due process under the Fourteenth Amendment. *Michelson* v. *United States,* 335 U.S. 469 (1948).

Ideally, jurors would begin their duties on a particular case with what the behavioral scientists like to call "tabula rasa" or clean slate, a mind devoid of any prior impression concerning the case.

One of the fundamentals of our concept of justice is a fair and impartial trial before an unbiased judge and an unprejudiced jury; the effect of such procedure in issue is to reverse the presumption of innocence.

A jury might be unduly influenced by a confession found involuntary and thus not properly in evidence. Similarly, the jury is influenced when it examines prior convictions to see if they are sufficient to support enhancement. Withholding of information concerning a prior conviction until after a verdict is reached on the primary offense is fair and equitable. There is absolutely no advantage in apprising the jury of the prior conviction initially; this merely serves to prejudice the jury's determination of the primary issue.

> "In this way, the well-recognized rights of an accused person will be protected, and the principles of justice and our long-established laws which have been designed to secure an impartial trial in every criminal case will be recognized, respected and obeyed." *State* v. *Ferrone,* 96 Conn. 160, 1113 Atl. 452 at page 458.

Argument

As shown by the original transcript herein and as shown by the opinion of the Court of Criminal Appeals of Texas which is attached hereto as Appendix A, the defendant ob-

jected to the reading of the indictment and after the reading of the indictment, the defendant moved for a mistrial and also objected to any and all testimony in regard to the first conviction on the grounds that said evidence denied the defendant due process of law and a fair and impartial jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments. The defendant did not take the witness stand, and his character was not put in issue as shown by the opinion of the Court of Criminal Appeals which specifically holds that this procedure does not violate the Constitution in any respect. The defendant has followed all state procedures in raising the federal question involved herein and all federal points were presented to the trial court at the appropriate time under the applicable Texas procedure and said questions were considered by the Texas Court of Criminal Appeals in rendering its opinion and were rejected. The record on file herein affirmatively shows that all necessary prerequisites of raising the federal issues involved were properly done even prior to the actual beginning of the trial itself.

Under the Texas procedure in existence at the time of this trial, after announcement of ready by both the State and the defendant, the prosecutor proceeded to examine the jury panel individually on voir dire. It was during this period that the prosecutor first brought to the attention of each individual juror the allegations of the prior conviction. These allegations were alleged in a formal indictment returned by a grand jury and officially signed by a foreman of the grand jury. The prosecutor informed each individual juror that even though this prior conviction of murder which was alleged in the indictment and which was signed by the foreman of the grand jury was not to be

considered as any evidence or proof on the question of the defendant's guilt or innocence on the primary charge, and that they could not consider the indictment or proof adduced as to the prior convictions for any purpose in determining the guilt or innocence of the defendant on the primary charge. This is the same as instructing each individual juror that they will not think of a specific thing such as an apple, a house, or a car, and there could be no other statement that would bring this to the attention of the juror's mind more explicitly than such an instruction. By this time the prospective jurors can only be thinking of one thing: the man before them is a criminal and has murdered once before. At this point the State's case was almost complete. The prosecutors throughout the State of Texas will readily admit that the easiest convictions are made under the enhancement statutes. As authorized by old Article 642 of Texas Revised Code of Criminal Procedure, the prosecutor read the indictment to the impanelled jury, and then again read in clear and unequivocal terms the allegation concerning a prior conviction of murder. Then with unquestionably tainted minds, the jury began to hear proof that the defendant, Leon Spencer, actually committed the prior offense of murder with malice of his wife, and at that point the first proof put on by the State of Texas was a certified copy of the indictment of the prior conviction, and a photograph of the defendant with a number across his chest showing that he had been convicted of murder with malice of a wife before, along with proof of the length of the sentence he received before. Testimony from police officials present at the prior conviction, and a certified copy of the conviction record from the Huntsville State Penitentiary were also introduced. This was all done before one scintilla of evidence was introduced against the

defendant on the charge of the primary offense of murder with malice for which he was on trial for his life. R. pp. 26-46.

From an examination of the transcript of record, it is apparent that the only purpose of introducing the evidence of a prior conviction of murder was to prejudice the defendant in the minds of the jury to such an extent that he would receive death in the electric chair and disregard his defense of murder without malice. It is submitted to this Honorable Court that the procedure in the instant case involving the death penalty violates the due process clause of the Fourteenth Amendment and also violates the Fifth and Sixth Amendments and denies this defendant a fair and impartial trial before a fair and impartial jury. The defendant would respectfully show that it has long been construed by court decisions that impartiality and a fair and impartial trial contemplate a trial before a jury of twelve impartial and unbiased men and is not a technical concept. It is a state of mind. *United States* v. *Wood,* 299 U.S. 177 at page 145 (1936). In *Baker* v. *Hudspeth,* 129 F.2d 779, 781, 782 (10 Cir., 1942), cert. den. 317 U.S. 681, it was held:

> "That deeply imbedded in the right to a fair and impartial trial is a requirement that the jury of twelve men chosen to sit in judgment shall have no fixed opinion concerning the guilt or innocence of the one on trial and that their ultimate verdict shall be based upon the facts as they are submitted to them by the court under its instructions and superintendence. Anything less is a farce, and a travesty upon justice."

It is the position of the defendant that it would be a physical impossibility for the average juror or any indi-

vidual, however intelligent, to separate the knowledge that this defendant had been previously convicted of murder with malice of a former wife and pigeonhole this knowledge into one section of his mind until the jury had convicted him of the primary offense of murder with malice of another wife and then magically bring this knowledge back solely for the purpose of assessing the punishment of the defendant. The defendant is certain that in informing the jury of this prior conviction of murder the State as a practical matter precluded a fair hearing for the defendant as to his guilt on the charge of murder for which he was currently being tried. Being deprived of a fair hearing, the defendant was denied due process. The term, due process of law, has been construed not as a rigid exclusionary rule of evidence, but as a constitutionally imposed standard of fairness, required of all state procedures.

The right to a fair trial is guaranteed in the Sixth Amendment to the Constitution of the United States and is also embodied as to state court proceedings in the due process requirement of the Fourteenth Amendment. *Turner* v. *State of Louisiana,* 379 U.S. 466. A fair trial in a fair tribunal is a basic requirement of due process. USA Constitutional Amendment 14.

Impartiality of jurors is not a technical concept and the Constitution lays down no particular test to determine this as this court has held in *Irvin* v. *Dowd,* 366 U.S. 717 at page 721:

> "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has

become as much American as it was once the most English. Although this court has said that the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, *Fay* v. *People of State of New York,* 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043; *Palko* v. *State of Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed 288, every state has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682; *Tumey* v. *State of Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654. This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States,* 98 U.S. 145, 155, 25 L.Ed. 244."

In the very recent case of *Estes* v. *State of Texas,* 381 U.S. 532, Mr. Justice Clark has stated:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."

Under the due process clause, as well as the Sixth Amendment, a defendant is accorded and indeed guaranteed the right to a fair and impartial trial. A fair and impartial trial contemplates a trial before a jury of twelve impartial and unbiased men. Jurymen cannot be impartial if fixed in their minds is the fact that the accused has been previously convicted for the same crime. In the words of the 10th Circuit in *Baker* v. *Hudspeth,* 129 F.2d 779:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury, no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial as guaranteed by the Sixth Amendment to the Constitution, is also a denial of due process, demanded by the Fifth and Fourteenth Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction illegal and void, and redress therefore is within the ambit of habeas corpus."

This court has gone one step further in the case of *In re Murchison,* 349 U.S. 133 at page 136 in holding:

> "A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our sys-

tem of law has always endeavored to prevent even the probability of unfairness."

In the case of Leon Spencer, in the light of human nature, the probability of unfairness to Leon Spencer was overwhelming. Allegations of a prior crime told to individual jurors on voir dire from the lips of a public official and read to the jury as part of the indictment before consideration of any evidence relevant to the current charge, and evidence introduced in open court under the court's sanction of a prior murder with malice of a former wife, is clearly more prejudicial than such evidence being brought to the jury's attention by any other conceivable means. A majority of the courts in this nation including this Honorable Court, have held that such evidence brought to the jury's attention by other means is so prejudicial as to require a verdict of guilty to be set aside. It is a well established rule of law that a person charged with a crime has a fundamental right to be tried on the merits of each charge against him. He is entitled to be tried not as a criminal generally, but upon the charge against him.

It is a further well-established general rule that evidence or allegations of prior convictions are inadmissible at a criminal trial either to establish guilt or to show that the defendant would be likely to commit the crime with which he is charged. *Weinstein* v. *State,* 146 Md. 80, 125 Atl. 889 (1924); 1 Wharton's *Criminal Evidence* §232 (12th ed. 1955); Vol. 2, McCormick & Ray, *Texas Law of Evidence,* 2d Ed. §251 at page 361; 1 Wigmore, *Evidence* (3rd Ed. 1940) §57. The primary reason for not admitting such evidence is that knowledge of other crimes is likely to prejudice the jurors against the accused and predispose them to a belief in his guilt. See 1 Wharton, *supra,* §232.

The little relevance such evidence has is heavily outweighed by its almost certain prejudicial effect. The strong judicial feeling that the jury's knowledge of prior crimes is highly prejudicial is well illustrated by decisions of the Supreme Court of the United States. Among the most noteworthy of these is *Marshall* v. *United States,* 360 U.S. 310 (1959), in which the Supreme Court granted certiorari because of:

> "doubts whether exposure of some of the jurors to newspaper articles about petitioner [which concerned previous convictions] was so prejudicial in the setting of the case as to warrant the exercise of . . . supervisory power to order a new trial." (360 U.S. at 310-11)

In holding that the exercise of such supervisory power was warranted, the court stated:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence." (360 U.S. at 312-13)

After the *Marshall* case, the Third Circuit, in *United States* v. *Jacangelo,* 281 F.2d 574 (3 Cir. 1960), held that the reading to the jury of a co-defendant's confession containing references to defendant's previous convictions required that a mistrial be ordered. Setting defendant's conviction aside and remanding the cause for a new trial, the court stressed the ease with which the harmful remarks in the confession could have been deleted without destroying its continuity or destroying it in any significant way, saying:

> "... we think he (the defendant) should not have been subjected to ... risk of unwarranted harm through the pointless and *wholly unnecessary* disclosure of his prior complicity in crime. Therefore, scrupulous concern that criminal jury trials be safeguarded as far as possible against prejudicial influences dictates that the appellant be granted a new trial. (Emphasis added) (281 F.2d at 577)

The Fourth Circuit also has followed the *Marshall* rule in *Holmes* v. *United States,* 284 F.2d 716 (4 Cir. 1960). There, after a jury had been charged but before it began its deliberations, the deputy marshal in charge of the jury, in answer to a question by a juror as to where the defendants were staying, remarked that one of them was in the county jail serving a sentence. Granting a new trial, the court said:

> "The subject matter of the communication was far from harmless. Nothing had occurred at the trial to make relevant evidence of a prior conviction of Bedami. The judge would not have permitted reference in open court to such a conviction. When the jury was privately informed of that fact by the deputy marshal out of the presence of the court and of counsel, there was not so much as opportunity to mitigate its obviously prejudicial effect." (284 F.2d 718-19)

An even more recent application of the *Marshall* rule appears in the *United States* v. *Kum Seng Seo,* 300 F.2d 623 (3 Cir. 1962) where, in a prosecution for violation of federal narcotics laws, the jury read newspaper clippings revealing defendant's incarceration in default of high bail ($100,000.00). A new trial was ordered.

Even before the *Marshall* decision, federal and state courts had frequently set aside convictions because evidence of prior crimes had been brought before the jury. *Helton* v. *United States,* 221 F.2d 338 (5 Cir. 1955); *State* v. *Ferrone,* 96 Conn. 160, 113 Atl. 452 (1921). See also *Weinstein* v. *State, supra.* It is obvious that these courts disapproved of the admissibility of evidence of prior convictions because of its undoubtedly prejudicial nature.

This court in the matter of *Oyler* v. *Boles,* 368 U.S. 448 in proceedings not attacking the constitutionality of the procedure in question held that the determination of whether one is a habitual criminal is essentially independent of the determination of guilt on the underlying substantive offense.

This court held in the case of *Chandler* v. *Fretog,* 348 U.S. 75 (1954) that the hearing and trial on the felony charge, although they may be conditioned in a single proceeding are essentially independent of each other. This court further held many years ago in 1912 in the case of *Graham* v. *West Virginia,* 224 U.S. 616 (1912) that the portion as to the habitual criminal was merely for identification only and they are clearly not for the establishment of guilt. Mr. Justice Douglas, presenting opinion in the *Oyler* case on page 461 held:

> "The charge of being an habitual offender is as effectively refuted by proof that there was no prior conviction or that the prior convictions were not penitentiary offenses as by proof that the accused is not the person charged with any new offense. The charge of being an habitual criminal is also effectively refuted by proof

that the prior convictions were not constitutionally valid."

It is unquestionably true that the issue of guilt and the issue of a prior conviction are separate fact determinations completely independent of each other. This case is analogous to the situation discussed and condemned by the court in the case of *Jackson* v. *Denno,* 378 U.S. 368 (1964) in that in those events where a jury might find and feel that a prior conviction was constitutionally invalid or was not an offense to which the penitentiary was assessed as punishment or that the defendant was not the same individual previously convicted, in that they would still have to determine his guilt or innocence on the primary charge. How could a normal juror separate the evidence of a prior conviction or allegation of a prior conviction from the evidence? This court in *Jackson* v. *Denno,* 378 U.S. 368 at page 389, footnote 15 notes that the Government should not have the windfall of having the jury influenced by evidence against the defendant which, as a matter of law they should not consider and which they cannot put out of their minds. The court further noted *that the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.* This was a footnote relating to the use of a confession of a co-defendant, under limiting instructions and relating to the limited instructions concerning use of the declarations of co-conspirators.

It has therefore been long since recognized by this court that it is a physical impossibility for jurors to separate and pigeonhole in their minds certain matters that are to be considered only for certain purposes.

The Fifth Circuit in opinion by Judge Gewin in *Dunn* v. *U.S.*, 307 F.2d 883 concerning improper arguments states:

> "One cannot unring a bell; after the thrust of the sabre it is difficult to say, 'forget the wound'; and finally, *if you throw a skunk into the jury box,* you can't instruct the jury not to smell it."

The Third and Fourth Circuit Courts of Appeals of the United States of America have each struck down these procedures and have said that such procedures have denied the appellants involved due process of law under the Fifth and Fourteenth Amendments. The Fourth Circuit Court of Appeals in the case of *Lane* v. *Warden, Maryland Penitentiary,* 320 F.2d 179 (1963) specifically holds that the state procedure involved in that matter, which is identical to the present case, denied the appellant due process under the Fifth and Fourteenth Amendments.

In another death penalty case, the Third Circuit Court of Appeals in the recent case of *U.S.* v. *Banmiller,* 310 F.2d 720 now specifically holds that the Pennsylvania procedure which is identical to the Texas procedure under attack (which existed prior to the adoption of the Split Verdict Act in the State of Pennsylvania and which permitted admission of prior unrelated convictions solely for the purpose of enabling the jury, after it had found the accused guilty of first degree murder in capital offenses, to determine in the same single verdict the validity of the prior conviction and the identification of the defendant, etc., to enhance the punishment), denied the defendant due process of law under the Fifth and Fourteenth Amendments.

Judge Biggs' opinion in *U.S.* v. *Banmiller,* 310 F.2d 720 (1962) at page 723 says:

"In respect to the habitual criminal statutes and their applicability, we point out that we are dealing with a death sentence. The danger resulting from prejudice is always enhanced in a capital case: passions run high, and the penalty is irreversible."

And at page 725 Judge Biggs further states:

"Certainly such a feat of psychological wizardry verges on the impossible, even for berobed judges. It is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury."

Judge Biggs' dissenting opinion in *U.S.* v. *Price,* 258 F.2d 918 at page 923 said:

"The impropriety of the Pennsylvania practice demonstrated by the circumstances of this case is so gross and results in such fundamental unfairness as to constitute a denial of due process of law."

Judge Hastie in his concurring opinion at page 923 said:

"Perhaps there are persons who can put this knowledge to one side until guilt is determined and then recall it to mind for the sole purpose of deciding what the sentence shall be. But certainly there is the gravest danger that this feat will be beyond the psychological capacity of the jurors, however intelligent or fair-minded they may be."

It is conceded by the prosecuting attorneys of the State of Texas that the easiest convictions which can be obtained are had by the State under the habitual criminal statutes, and that they realize that the jury considers prior convic-

tions, at least in their own minds, as evidence of guilt, particularly when the prior conviction involves similar fact situations, as in the instant case where the prior conviction was of murder with malice of a former wife, and the subsequent charge was of murder with malice of a former wife. The very first evidence introduced by the State in the instant case was a picture of the defendant in a prison uniform with a number across his chest, and then the state introduced certified copies of the judgment and conviction in the prior case and put proof before the jury that the defendant was out on parole and that this original sentence had not passed at the time of trial; all of these things were done solely for the purpose of prejudicing the defendant in the minds of the jury.

This Honorable Court in the case of *Betts* v. *Brady,* 316 U.S. 455 at page 462 held that:

> "... that which may, in one setting, constitute a denial of fundamental fairness shocking to the universal sense of justice may, in other circumstances, in the light of other considerations fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed."

Further, Mr. Justice Burton stated in the case of *Bute* v. *Illinois,* 333 U.S. 640, 68 S.Ct. 763 at page 649 (1948) that:

> "Due process under the Fourteenth Amendment ... has reference ... to a standard of process that may cover many varieties of processes that are expressive of different combinations of historical or modern, local or

other juridical standards, provided they do not conflict with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . "

It is apparent that the conflict is obvious and glaring in the instant case before this court.

Several states have realized the inherent unfairness to the defendant in such a procedure as in the instant case and revised their procedure by judicial decree. 43 Texas Law Review, *infra*, p. 394. Some 26 states follow the old practice of informing the jury at the outset of the trial. With a few exceptions, the remaining states follow the new procedure of informing the jury of the prior conviction only if and after the conviction for the present offense.

It is respectfully pointed out to the court that the procedure under attack at the present time is analogous to that of the case of *Jackson* v. *Denno, infra* wherein this Honorable Court condemned as violative of due process a law allowing the jury to consider the voluntariness of the confession, as well as the defendant's guilt on the primary offense. The rationale was that the jury might be unduly influenced by a confession found involuntary and thus not properly in evidence. Similarly, the jury is influenced where it examined prior convictions to see if they are sufficient to support enhancement. This analysis is correct when the common-law procedure does not give the defendant due process, and, further, as shown by the Law Review article analysis, disregarding the due process question, it cannot be denied that the withholding of information concerning prior convictions until after a verdict is reached on the primary offense is fair and equitable and there is

absolutely no advantage in apprising the jury of the prior convictions at an earlier stage, particularly in the instant case, for had the jury convicted the appellant of only murder without malice, then such evidence of prior conviction would have been rendered inadmissible for any purpose; and indeed such presentment merely serves to prejudice the jury's determination on the primary issue of guilt or innocence, despite instructions to the contrary.

Federal Decisions

In the case of *Lane* v. *Warden, Maryland Penitentiary,* 320 F.2d 179 (1963), Lane was a state prisoner who brought habeas corpus against the penitentiary warden on grounds that a fair trial was precluded by reading to the jury at the commencement of his prosecution for narcotics law violations, that part of the indictment setting forth the defendant's prior convictions on similar charges. Circuit Judge Boreman of the United States Court of Appeals, Fourth Circuit, wrote a lengthy opinion reaching the conclusion:

> "That under the facts of this case, the reading to the jury at the commencement of Lane's trial of that portion of the indictment relating to his prior convictions destroyed the impartiality of the jury and denied him due process of law."

Judge Boreman methodically set about to show that prejudice arises where the jury, before determining his guilt or innocence on the charge for which he was on trial, is informed that the accused has been previously convicted of similar crimes. He relied upon *Michelson* v. *U.S.*, 335 U.S. 469 (1948) where the court said:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . .
>
> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

The court continued in *Michelson* by saying:

> "The overriding policy of excluding such evidence despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." 335 U.S. 469 at pages 475-476.

Admittedly, in a footnote to the *Michelson* case (335 U.S. at 475, n. 8) this court indicated some qualification of the rule that the state may show defendant's prior trouble with the law, "as when a prior crime is an element of the later offense; for example, at a trial for being an habitual criminal." The possible qualification would not seem to be a problem in Texas, because the Court of Criminal Appeals has held on numerous occasions that the prior convictions alleged for enhancement are not an element of the primary offense but are to be used strictly in order to in-

crease the punishment. See Judge Woodley's concurring opinion on rehearing in *McDonald* v. *State*, 385 S. W. 2d 253 (1965) at page 254. Also see *Ellison* v. *State*, 227 S. W. 2d 545 (1950); *Sigler* v. *State*, 157 S. W. 2d 903 (1942); and *Williams* v. *State*, 5 S. W. 2d 514 (1928).

In the *Lane* v. *Warden, Maryland Penitentiary, infra*, case the court recognized the exception to the general rule that when the defendant voluntarily submits himself as a witness, he may, for purpose of impeachment, be interrogated concerning prior convictions and in the event he denies such convictions, proof could be presented. The court cited *Marshall* v. *United States*, 360 U.S. 310 (1959), where seven jurors obtained newspaper information as to a defendant's prior convictions. In the *Marshall* case, the court reversed notwithstanding that the trial judge made a personal finding by privately interviewing each juror and receiving their assurance that they would not be influenced or prejudiced by the newspaper articles.

Judge Boreman in *Lane* v. *Warden*, further stated:

> "Although the Constitution does not demand the use of jury trials in a state's criminal procedure; where a jury trial is provided, it must be a fair trial." *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Fay* v. *New York*, 332 U.S. 261 (1947).

320 F.2d 186 in *Lane* v. *Warden*, it is stated:

> "In such a case (referring to the *Lane* case) it is the duty of the Federal Courts to safeguard against the state's violation of the individual's constitutional right to a fair and impartial trial."

Shortly after the *Lane* decision, the Supreme Court of Idaho in *State* v. *Johnson,* 383 P.2d 326 (Idaho, 1963), reversed a forgery conviction where prior convictions relied on to enhance the punishment of a persistent violator had been read to the jury as a part of the information. The court adopted the procedure outlined in *State* v. *Ferrone, infra,* requiring that the entire information should be read to the accused and his plea taken in the absence of the jurors. Thereafter, the portion of the information which sets forth the crime for which he was to be tried should be read to the jury, but the jury should retire to consider the verdict only on the first part of the information. In the event a verdict of guilty, the second part of the information concerning the prior convictions was required to be read to the jury without reswearing them and they would then be charged to inquire on that issue under proper instructions. This excellent opinion contains an exhaustive survey on the procedures used in the various states.

The serious constitutional question of procedure in the prosecution of such cases was recognized as early as 1692 and this general exclusionary rule was first applied in Harrison's Trial, 12 How. St. Tr. 833, 864 (1692) where in the prosecution for murder, evidence of a prior felonious conduct was excluded with the court's observation:

> "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has not notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter." 1 Wigmore, *Evidence* 3d Ed. §194.

State Decisions

As early as 1921 the serious constitutional questions of procedure was recognized in the Connecticut Supreme Court of Errors in the case of *State* v. *Ferrone,* 96 Conn. 160, 113 Atl. 452, which revised the manner of procedure in the so-called habitual criminal statutes by stating:

> "It cannot be believed that an accused man will ever have a fair trial resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during the trial, allegations that he has twice before been convicted of state prison crimes have been read to the jury, and the evidence of his former convictions has been placed before them, it is beyond question that knowledge of such facts must necessarily prejudice the minds of his triers against the accused and cause more serious injury than that which he would suffer from any improper remarks of the state counsel."

The case further held that in habitual offender cases two separate questions were presented. 1.) The issue as to the commission of the specific crime alleged and 2.) The issues as to the former convictions. The Connecticut practice requirements as set forth in *Ferrone* require that the verdict of the jury on the preliminary offense not be colored or tainted by knowledge of the alleged previous convictions. If such verdict on the principal issue be guilty, then the second issue may be submitted to the jury. After *Ferrone,* various other states began to change procedure either by legislation or by rules after recognizing the inherent unfairness to the defendant. See section 556.280

Revised Statutes Missouri, 1959; and *State* v. *Kent,* 382 S. W. 2d 606 (Missouri, 1964). Also see 21 Oklahoma Statutes Ann. 51 and *Payne* v. *State,* 388 P.2d 331 (Okla., 1963); *Harris* v. *State,* 369 P.2d 187 (Okla., 1962); *Heinze* v. *People,* 253 P.2d 596 (Colo., 1953); *State* v. *Stewart,* 171 P.2d 383 (Utah, 1946); *Robertson* v. *State,* 197 So. 73 (Ala., 1940); *McCallister* v. *Commonwealth,* 161 S. E. 67 (Va., 1931); *State* v. *Zeiner,* 10 Utah 2d 45, 347 P.2d 1111; *Hill* v. *Hudspeth,* 161 Kan. 376, 168 P.2d 922; *Kennedy* v. *State,* 171 Neb. 160, 105 N. W. 2d 710; *State* v. *Kirkpatrick,* 181 Wash. 313, 43 P.2d 244; Vol. 43 TLR p. 394, "Evidence—The Introduction of Evidence of Prior Convictions Before a Jury in Habitual Criminal Proceedings."

Since the trial of the instant case and the filing of this appeal the state of Texas has repealed the Code of Criminal Procedure provision in question and has provided for a split verdict. The Supreme Court of the state of Tennessee and the Supreme Court of the state of Arkansas have recently declared identical statutes unconstitutional based upon the contentions made in the instant case. These cases are *Miller* v. *State,* 394 S. W. 2d 601; *Harrison* v. *State,* 394 S. W. 2d 713 and *Cummings* v. *State,* 396 S. W. 2d 298. William E. Miller, Chief Judge of the United States District Court for Middle District of Tennessee in the matter of *William H. Haggard* v. *Henderson* contained in 252 F. Supp. 763 (1966) has specifically held that the introductions of former convictions to prove habitual criminal charges in conjunction with trial on the substantive offense constitutes not merely denial of procedural fairness, but denial of due process of law and that simultaneous trial of burglary and habitual criminal charges constitute a denial of due process of law and rendered the conviction void. Judge Miller, in his very well reasoned opinion, holds that the view

adopted by the 4th Circuit in *Lane* v. *Warden, Maryland Penitentiary, infra,* is also consistent with the decisions in the field of evidence. Subject to exceptions, it has been repeatedly held that the evidence of other offenses is not relevant to the charge on trial and may not be introduced.

Judge Miller further specifically pointed out that the split verdict procedure has been statutory procedure in England since the Act of 6 and 7 William IV, C. III enacted in 1836. Such act provided:

> "It should not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felonies and shall have found such person guilty of the same. Whenever in any indictment such previous conviction shall be stated, the reading of such a statement to the jury as part of the indictment shall be deferred until such a finding as aforesaid."

Exception was made in the cases where the accused gave evidence of good character to meet the charge of crime whereupon the prosecutor might show the former conviction before the verdict of guilty has been returned and in *Regina* v. *Shuttleworth,* 3 C & K 375, 376, Lord Campbell thus stated the practice under the statute by holding tnat:

> "It is the opinion of all the judges that the prisoner is to be arraigned on the whole indictment and the jury ought to have the new charge only stated to them and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction until the jury have given the verdict as to the new charge. The jury without being resworn are then to have the pre-

vious conviction told to them; and the certificate of it is to be put in and the prisoner's identity proved."

At the present time, approximately one-half of the states follow the old practice of informing at the outset of the trial. With a few exceptions, remaining states follow the new procedure of informing the jury of the prior conviction only if and after the conviction of the present offense. The cases and statutory provisions of various states are set forth in Appendix H of the Appellant's Jurisdictional Statement which is a copy prepared by the Legal Aid Clinic of Southern Methodist University Law School.

Although the trial court instructed the jury that it could not consider the evidence of the defendant's first conviction as any evidence of the guilt or innocence of the defendant on the primary charge of murder with malice or murder without malice, it is respectfully submitted unto the court that it is a psychological impossibility for the average juror, however intelligent or fair-minded he may be, to separate this evidence and to consider it only on the issue of punishment. In this case the defendant had been convicted before of the offense of murder with malice of his former wife and on the primary charge he was charged with murder with malice of his common-law wife and therefore, the prior conviction could not be separated by the jurors in their minds.

The Court of Criminal Appeals of the State of Texas has recognized that this procedure is wrong and in the case of *Oler* v. *State,* 378 S. W. 2d 837 (which upheld the constitutionality of this procedure) recognized the seriousness of this question and stated:

"While we agree that there is much merit in the appellant's contention, and undoubtedly the trend is in that direction we must exercise judicial restraint and await the action of the legislative branch of the government."

Recently the Court of Criminal Appeals of the State of Texas has attempted to ameliorate this situation and has allowed the defendant to stipulate the validity of the prior conviction where there is a mandatory punishment involved and where the jury does not have to assess the punishment. As shown by the record in this cause (R. 23), an attempt was made by the attorneys for the defendant to stipulate the existence of the prior conviction, but this was refused by the trial court and the Texas Court of Criminal Appeals on the ground that the jury could legitimately consider the existence of this prior conviction in assessing the punishment in the instant case at either life or death. It is the position of the attorneys for the defendant that the Fifth Circuit in *Breen* v. *Beto,* 341 F.2d 96 (5 Cir., 1965), while upholding the Texas procedure has stated that the Texas Court of Criminal Appeals has allowed for an alternate method of stipulation and that this helps to ameliorate the difficulties and the unconstitutionality and the bad procedure, but in the instant case of Leon Spencer, an attempt to stipulate was made and this attempt was refused by the trial court and the Texas Court of Criminal Appeals. The Legislature of the State of Texas in its proposed new Code of Criminal Procedure in 1963 amended this procedure and allowed a split verdict in such a case. This was passed by both houses of the Legislature of the State of Texas but was vetoed by the Governor of the State of Texas because of typographical errors in the bill actually reaching his

desk. There was a great hue and cry among the lawyers of the State of Texas to change this procedure as shown by a recent law review article, "Evidence—The Introduction of Evidence of Prior Conviction Before a Jury in Habitual Criminal Proceedings" Vol. 43 Texas Law Review p. 392. This article states that in the interest of justice, remedial legislation in Texas is not only desirable but necessary.

Since the filing of this appeal, the State of Texas has repealed the article in question effective January 1, 1966 and now has joined the line of all modern jurisprudence in the United States in allowing for a split verdict. This came into effect on January 1, 1966, and was not retroactive and was not applicable to the instant case. In effect the State of Texas has agreed to the amendment upon urging the lawyers of the State of Texas and the Texas Court of Criminal Appeals that the procedure in question is wrong, but if this conviction is allowed to stand, the defendant, Leon Spencer, will be denied a fair and impartial hearing before a fair and impartial jury and due process of law without the benefit of this remedial legislation.

Under the existing Texas procedure the only possible admissibility of the evidence of a prior conviction of murder on the part of the defendant was for the jury to enhance the punishment of the defendant. The defendant did not take the witness stand and his character was not put into evidence and the prior conviction should not have been submitted to the jury for any purpose until they had first convicted the defendant of murder with malice. In the instant case, the trial court submitted the defense of murder without malice based upon the facts that were presented

to the jury at that time (feeling that such defense was raised by the evidence); yet if the jury had found this defendant guilty of only murder without malice, his maximum punishment would have been five years and the terms and provisions of the enhancement statute would not have been applicable and the evidence of the prior conviction of murder with malice would have been inadmissible for all purposes since the first conviction was a conviction involving a capital offense and the second would have been a conviction involving a non-capital offense. The Court of Criminal Appeals of the State of Texas has met this problem by refusing to write on it and by stating that discussion of this contention would not add to the jurisprudence of this state.

Conclusion

Wherefore, defendant respectfully prays that this Honorable Court note jurisdiction herein and reverse the judgment of the trial court and declare the procedure and statutes in question to be unconstitutional and reverse the affirmance of the Court of Criminal Appeals of the State of Texas and that the conviction be set aside, vacated and held for naught, and in the event this court feels that this appeal is improvident, the same be considered as an application and petition for writ of certiorari and that same be granted and that the judgment and sentence together with the order of affirmance in this matter be set aside and that a new trial be granted for this appellant and that this

Honorable Court issue said writ of certiorari in the Court of Criminal Appeals of the State of Texas as hereby prayed for by petitioner and appellant.

Respectfully submitted,

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This is to certify that I, Joe B. Goodwin, a member of the Bar of the Supreme Court of the United States, pursuant to Supreme Court Rule 33.3(b) have duly airmailed, postage prepaid, a true copy of the foregoing Appellant's Brief to the Hon. Waggoner Carr, Attorney General, State of Texas, Austin, Texas.

JOE B. GOODWIN

Dated:

APPENDIX A

APPEAL FROM JEFFERSON COUNTY

No. 37,921

LEON SPENCER,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

OPINION

The offense is murder; the punishment, enhanced under Art. 64, V.A.P.C., death.

Art. 64, V.A.P.C. provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

The testimony reflects that appellant and deceased had lived together for about four or five years and had separated in October or November, 1963. On January 7, 1964, around 7:30 P.M. deceased was at her home in the City of Beaumont with her two sons, aged fourteen and eight, and her daughter, about eighteen years of age, and her daughter's twenty month old baby. As deceased was lying on the bed playing with the baby the appellant walked into the house, entered the room where deceased was and almost immediately fired one shot with a pistol. The shot hit deceased in the face, and she fell off the bed. Deceased's daughter, who was in the room at the time this occurred, jumped over the bed and lay down on top of deceased to

protect her. At that time appellant walked around the bed, pulled deceased's daughter up and fired four more shots into deceased's face and head. Appellant was attacked at that time by deceased's fourteen year old son who had seen part of this occurrence. Appellant knocked the knife out of the son's hand and walked out of the front door of the house where he stopped and appeared to be either loading or unloading the pistol. The deceased's daughter ran out of the house after him and when she fell down, appellant looked back at her and told her her mother was no good and then he grinned.

After leaving the house where the shooting occurred, appellant walked into the Sheriff's Office at approximately 8:15 P.M. and had in his possession a .22 caliber pistol containing three live shells and three spent cartridge cases. The pistol was proved to have been purchased by the appellant from Phillips Pawn Shop in the City of Beaumont between 4:00 P.M. and 5:30 P.M. on January 7, 1964.

The cause of the deceased's death was established by medical testimony showing that she had died as a result of gunshot wounds to the brain.

The State proved that the defendant had been previously convicted of the offense of murder with malice as alleged in the indictment.

We find the evidence sufficient to sustain the verdict.

Appellant offered to stipulate, prior to the trial, that he had been previously convicted of murder as alleged in the second count of the indictment. Upon making this offer appellant moved the trial court to instruct the state not to read the portion of the indictment which referred to the prior conviction and not to offer any proof of said prior conviction, which motion was denied.

Appellant also objected to the reading of the indictment, and after the reading of the indictment alleging the prior conviction, he moved for a mistrial and also objected to any and all testimony in regard to the first conviction.

Appellant bottoms the foregoing contentions upon the theory that the trial court denied him due process of law

by sanctioning this procedure on the part of the state before the determination of his guilt on the primary offense. He contends that there was no fact issue for the determination of the jury as to his identity or the validity of the prior conviction.

Appellant also contends that Art. 64, V.A.P.C. is unconstitutional for the reason that it places the accused in double jeopardy in that this statutory provision uses the fact of the preceding offense to establish an element of the primary offense.

We shall dispose of these three related contentions together, as the parties have done in their briefs. We have consistently held that the procedure of reading an indictment to a jury showing that the person on trial has been previously convicted is not a violation of due process of law. We held in Wright v. State, 364 S. W. 2d 384, a case in which the appellant there offered to judicially confess and stipulate as to his former conviction instead of the State offering proof of the prior conviction, that the state could not be prevented from making proof of the prior alleged conviction. Wright's conviction was under Art. 64, V.A.P.C.

In Pitcock v. State, 367 S. W. 2d 864, this court, speaking through this scrivener, did announce a new rule *in those cases where "the jury has no choice in imposing punishment* if it finds the appellant guilty and that he has been previously convicted." We said: "Thus, if accused stipulates the prior conviction, that issue is resolved and the question of guilt is all that remains." We are convinced of the soundness of this rule, but *it is not applicable to cases coming under Art. 64, supra.* The jury does have a choice in imposing punishment under Art. 64, as may be seen from the foregoing terms of this article.

Since appellant's contentions have been before this Court numerous times, we shall not enter into a detailed discussion. His contentions have been adversely decided by this Court in the rather recent case of Wigginton v. State, No. 37,645, and cases there cited.

We adhere to these prior holdings and overrule appellant's contentions.

We have examined with great care appellant's remaining contentions, but we find no error reflected by them. It would contribute nothing to the jurisprudence of this state by discussing them here.

Finding no reversible error, the judgment is affirmed.

McDonald, Presiding Judge

(Delivered March 17, 1965)

APPENDIX B

Art. 64, Vernon's Annotated Penal Code of the State of Texas:

> *"Art. 64 1621, 1017, 821 Second conviction for capital offense.*
>
> "A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

APPENDIX C

Art. 642, Vernon's Annotated Code of Crim. Procedure of the State of Texas:

"Article 642. 717, 697 Order of proceeding in trial

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.

2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.

3. The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof.

4. The testimony on the part of the State shall be offered.

5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by the defendant's counsel.

6. The testimony on the part of the defendant shall be offered.

7. Rebutting testimony may be offered on the part party."